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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERT RUBEN HERNANDEZ,

Defendant and Appellant.

F057122

(Super. Ct. No. BF125023A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

Patricia L. Watkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Louis M. Vasquez, Lloyd G. Carter, and Leanne Le Mon, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Gomes, J., and Kane, J.

STATEMENT OF THE CASE

On November 24, 2008, appellant, Gilbert Ruben Hernandez, was charged in an amended information with attempted murder (Pen. Code, §§ 664, 187, subd. (a), count one)¹ and two counts of assault by means likely to cause great bodily injury (§ 245, (a)(1), counts two & three). Counts one and two alleged enhancements for causing great bodily injury (§ 12022.7, subd. (a)) and for personal use of a firearm (§§ 12022.53, subd. (d) & 12022.5, subd. (a)). The information also alleged a prior prison term enhancement (§ 667.5, subd. (b)). At the conclusion of a jury trial on January 15, 2009, appellant was found guilty of count two, the great bodily injury enhancement, and the section 12022.5, subdivision (a) enhancement. The jury acquitted appellant of counts one and three. In a bifurcated proceeding, the court noted appellant had admitted the prior prison term enhancement.

On February 18, 2009, the trial court sentenced appellant to prison for three years on count two. The court sentenced appellant to consecutive sentences of three years for the great bodily injury enhancement, four years for enhancement for the personal use of a gun, and one year for the prior prison term enhancement. Appellant's total prison term is 11 years.

On appeal, appellant contends the prosecutor improperly argued to the jury how it could use his prior conviction, thereby lowering the People's burden of proof. Appellant further contends that the prior prison term enhancement was neither proven with a true finding by the trial court nor did appellant admit it.

FACTS

In early September 2008, Cesar Ramos and Violet Jaquez broke off their relationship as boyfriend and girlfriend. They continued to communicate over the phone. On September 21, 2008, Ramos received a couple of messages from Jaquez to stop by

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

her home. Ramos called Jaquez and told her he would stop by that morning, but did not arrive until about 11:00 p.m. Ramos drank some 24 ounce bottles of beer before leaving.

On his way to Jaquez's home, the battery to Ramos's car died. He parked in the alley behind Jaquez's home. Ramos went through the backyard and knocked on the back door.² Jaquez came out through the kitchen door and had a discussion with Ramos during which she became upset with Ramos and screamed at him. Jaquez went back into her house, then came back outside when Ramos knocked on the door again. Jaquez told Ramos to leave.

Ramos went back to his car, but realized his car battery was dead. Ramos had to go back to Jaquez's home and knocked on the door. No one answered so Ramos knocked louder. Two guys came out and started beating Ramos. Ramos remembered one of the assailants was appellant and identified him in court. The assailants told Ramos, "[t]o get the fuck out." Ramos did not swing at the assailants. Both assailants swung at and hit Ramos. Both assailants kicked Ramos. Ramos threw himself onto the ground and curled into a ball.

When the hitting and kicking stopped, Ramos got up and one of the assailants told him to jump the fence of the backyard and get out. Ramos jumped over the fence, which was about four feet high. Ramos asked for his boots. One of the assailants threw them over the fence. One of the assailants said something to Ramos and then shot him. Ramos was not sure which assailant did so. Jaquez heard a gunshot and saw appellant with a gun in his hand. Appellant told Jaquez he only shot at Ramos to scare him.

Ramos reached to feel his chest. Ramos "felt a hole in [his] heart." Ramos ran to a neighbor's house in the opposite direction of the shooter. Ramos heard one more shot. Ramos jumped a fence, went to the front door, and asked them to call the police because he was dying. They shut the door on Ramos. Ramos ran to the next house. A young boy

² Jaquez explained she was in the bedroom with her new boyfriend, Miguel Galvez, and appellant when Ramos knocked on the door.

answered. Ramos asked him to call the police. Ramos was struggling to breathe and felt like he was dying. Ramos's next memory was waking up in the hospital.

Ramos was in the hospital for nine days. Ramos suffered injuries to his liver, lungs, and heart. Ramos received a bullet wound to the chest with a physician's diagnosis of a laceration to his liver and surgical repair for his right atrium. An X-ray of Ramos's abdomen showed a bullet in the pelvis that was left in his body.

Appellant testified that he had prior convictions for spousal abuse in 2003 and felony possession of stolen property.³ Appellant explained he went to Jaquez's home to collect \$140 for methamphetamine he had given her the prior evening. Before going to Jaquez's home, appellant had been drinking beer and smoking weed. Jaquez gave appellant \$60. Appellant and Galvez, who was now Jaquez's girlfriend, stayed for a while.

When Jaquez and Galvez left the bedroom, appellant found a black revolver.⁴ Appellant decided to take the revolver so he would get his money from Jaquez. Appellant stated there was no guard on the gun and was concerned he could shoot himself with it. Appellant pulled out a bandana, twisted one end of it, and jammed it twice behind the trigger. Appellant was aware the gun was loaded with ammunition. After Jaquez and Galvez returned to the bedroom, they heard Ramos knocking at the door. Jaquez and Ramos yelled at each other and exchanged profanity. About 30 to 45 seconds after appellant thought Ramos had gone, Ramos was back pounding on the door louder than the first time and kicking it.

According to appellant, Ramos was demanding that everyone in the bedroom come outside. Galvez opened the door and asked why appellant was being disrespectful. Galvez and Ramos began fighting each other. Appellant wanted to help his friend, so he

³ Appellant did not admit that he was incarcerated in state prison for either offense.

⁴ Jaquez testified that she did not have a gun in her possession nor did anyone else bring a gun into her bedroom.

too struck Ramos with his fists. When Ramos fell to the ground, appellant kicked him. The fighting ended when Galvez told Ramos to leave. Ramos lost his shoes during the fighting and asked for them. Appellant grabbed them and threw them toward Ramos.

Appellant said that Ramos then began to yell at him and threatened to kill appellant. Ramos grabbed at his front pockets with his hands. Appellant was unsure what Ramos was doing. Ramos was coming toward appellant. Appellant had already pulled out his gun and taken the bandana off so he could scare Ramos. Appellant pointed the gun at Ramos and it fired. Appellant denied pulling the trigger and having any intent to aim the gun at or to shoot Ramos. Appellant ran away and later turned himself into the police a few days later.

ALLEGED PROSECUTORIAL MISCONDUCT

Introduction

Appellant contends the prosecutor committed misconduct and lessened the People's burden of proof when, during closing argument to the jury, she argued that appellant was convicted of spousal abuse. Appellant argues that this argument was directed toward appellant's propensity to commit violence rather than to impeach appellant with a prior conviction. Appellant argues the prosecutor's argument violated his right to due process. As we explain, appellant has failed to show prosecutorial misconduct.

The prosecutor made the following argument:

“[PROSECUTOR]: Defense counsel was talking about guys who don't let their girlfriends go. Those things happen. The same with girlfriends not letting boyfriends go. Things like that happen.

“There is a difference between an individual who takes things to the point where they will beat up the girlfriend, or kill the boyfriend, there's a difference.

“And it just so happens actually in this case that there's evidence that the defendant is convicted of spousal abuse.

“[DEFENSE COUNSEL]: Your Honor, I object to that. That's improper argument.

“THE COURT: Sustained.

“[DEFENSE COUNSEL]: Ask the Court to order the jury to disregard that statement.

“THE COURT: No. The objection is sustained. The jury is instructed that the statements of counsel are not evidence.”

Analysis

The prosecutor argued there was a difference between boyfriends and girlfriends having difficulty in breaking up and when a breakup leads to violence. The prosecutor immediately referred to evidence that appellant was convicted of spousal abuse. In making her argument in this way, the prosecutor was, in effect, arguing that appellant had a propensity to be violent. The propensity of a defendant to violence is generally inadmissible. (Evid. Code, § 1101, subd. (b); *People v. Karis* (1988) 46 Cal.3d 612, 636.) The trial court’s immediate instruction to the jury was that the prosecutor’s comment was not evidence.⁵ Although the court’s instruction is a correct instruction, it did not focus on the issue that the prosecutor could only use appellant’s convictions for impeachment, not to show propensity to commit violent acts or crimes.

The court, however, instructed the jury with several instructions, which read as a whole, properly focused on how the jury should consider evidence of prior convictions. The court advised the jury it must decide the facts, follow the law as explained to it by the court, and “[i]f you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions.” (CALCRIM No. 200.) The court instructed the jury that when evidence was admitted for a limited purpose, the jury may consider the evidence only for that purpose. (CALCRIM No. 303.) The court further

⁵ The jury was further advised that nothing the attorneys say is evidence, including their remarks in opening statements and closing arguments. (CALCRIM No. 222.)

instructed the jury with CALCRIM No. 316 on how to evaluate the credibility of a witness who has committed a crime or other misconduct.⁶

The jury was properly instructed on how to evaluate evidence of a witness's prior convictions. This included the admonishment that the prior conviction could only be used to determine a witness's credibility. The jury was further instructed to follow the court's instructions as to the law, not an attorney's interpretation of the law. It is presumed the jury followed the trial court's admonitions and instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.) Appellant's argument assumes that the jury did not follow the court's instructions.

Although it is misconduct for the prosecutor to misstate the law, on appeal we measure the effect of such a misstatement in the context of the whole argument and the trial court's instructions. (*People v. Marshall* (1996) 13 Cal.4th 799, 831.) When the point focuses on comments made by the prosecutor to the jury, the question on appeal is whether there is a reasonable likelihood the jury misconstrued or applied any of the complained-of remarks in an objectionable fashion. (*Ibid.*; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) Given the trial court's use of CALCRIM No. 316 and the prosecutor's very limited commentary, we find no reasonable likelihood that the jury applied the comment in an objectionable way.

We may not reverse for prosecutorial misconduct if it is not reasonably probable that a result more favorable to the defendant would have been reached in absence of the misconduct. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.) The appellant himself admitted the prior conviction for spousal abuse. More importantly, the jury acquitted

⁶ CALCRIM No. 316 provides:

"If you find that a witness has committed a crime or other misconduct, you may consider that fact only in evaluating the credibility of the witness's testimony. The fact that a witness may have committed a crime or other misconduct does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable."

appellant of attempted murder demonstrating it could follow the court's instructions and evaluate the evidence and the arguments of counsel fairly and objectively. We therefore reject this contention.

PRIOR PRISON TERM ENHANCEMENT

Appellant contends, and respondent concedes, there was insufficient proof of the prior prison term enhancement allegation. When appellant admitted he committed two prior felonies, he did not admit that he served a prior prison term or that he was reconvicted of a felony within five years of serving a prison term. The prosecutor presented no evidence at trial to prove the prior prison term enhancement. The trial court made a finding that, based on appellant's admission of prior convictions, the prior prison term enhancement was true.

The imposition of a prior prison term enhancement pursuant to section 667.5, subdivision (b) requires proof the appellant: (1) was previously convicted of a felony; (2) was imprisoned because of that conviction; (3) completed the term of imprisonment; and (4) failed to remain free for five years of both prison custody and the commission of a new felony offense. (*People v. Tenner* (1993) 6 Cal.4th 559, 563.) Because there is no proof of appellant's prison term or that he was reconvicted of a felony within five years of his prison term, the record does not show each element of the enhancement beyond a reasonable doubt. (*Ibid.*)

The United States and California Supreme Courts have held that retrial of a prior conviction allegation does not violate the double jeopardy clause of the federal Constitution. (*Monge v. California* (1998) 524 U.S. 721, 734; *People v. Barragan* (2004) 32 Cal.4th 236, 241-259.)

DISPOSITION

The trial court's finding that the prior prison term enhancement is true is reversed and the case is remanded for further proceedings. The judgment is otherwise affirmed.